"NOT FOR PUBLICATION"
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CARL R. LUEM, and
CAROL LUEM,
Debtors.

Nos. 96-55597
96-55601

PATRICIA A. BILLETTER,
Plaintiff-Appellee,
v.
CARL R. LUEM, M.D.,
Defendant-Appellant.

D.C. Nos.CV-92-00221-AHS
CV-93-00354-AHS
MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding
Submitted August 4, 1997**
Pasadena, California
Filed August 7, 1997

Before: HALL and T.G. NELSON, Circuit Judges, and
WINMILL, *** District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

*** Hon. B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

Dr. Carl R. Luem appeals from (1) an order denying summary judgment and (2) the district court's judgment in favor of Patricia A. Billetter following a court trial. Billetter brought this action claiming, *inter alia*, battery by way of unrequested and unnecessary surgery. Luem unsuccessfully moved for summary judgment on the grounds that the one-year statute of limitations for battery had expired as to two of the three surgeries performed. On the day trial was scheduled to begin, the district court refused Luem's request to substitute counsel for pro se representation. In the absence of Luem, the bench trial was conducted and Billetter prevailed. We affirm both the denial of summary judgment and the district court's entry of judgment.

I.

Under California law, an action for battery must be brought within one year. Cal. Civ. Proc. Code § 340(3) (West 1996). That limitations period may be tolled, however, during the physician/patient relationship when the patient is unaware that the surgery was unnecessary. *Hundley v. Saint Francis Hosp.*, 327 P.2d 131, 135 (Cal. Dist. Ct. App. 1958). When the question turns on what reasonable person should know, a mixed question of law and fact is presented that is reviewed for clear error. *Rose v. United States*, 905 P.2d 1257, 1259 (9th Cir. 1990).

Despite Luem's protests to the contrary, *Hundley* directly controls this case. In *Hundley*, as in this case, the patient was aware of the extent of the surgery shortly after it was conducted. *Hundley*, 327 P.2d at 135. In *Hundley*, there was testimony that the doctor told the patient that the surgery was necessary because of "a pathology that he found there." *Id.* In this case, Billetter testified that Luem told her that he removed "fibrocystic tissue" during the first surgery. In

neither case, however, was there any evidence of the existence of such offensive tissue. *See id.* In *Hundley*, as in this case, the plaintiff's complaint for battery is dated within one year of her discovery, that the surgery was performed unnecessarily. *Id.* We hold, therefore, that the district court's refusal of summary judgment was appropriate.

II.

We also hold that the district court did not abuse its discretion or deny Luem's constitutional rights by denying Luem's motion to substitute an attorney to represent him at trial. The Local Rules of the Central District of California provide: "Unless good cause is shown and the ends of justice require, no substitution or relief of attorney will be approved that will cause delay in prosecution of the case to completion." C.D. Cal. Civ. R. 2.8.2.4. The district court's compliance with local rules is reviewed for an abuse of discretion. *Hinton v. NMI Pac. Enters.*, 5 F.3d 391, 394 (9th Cir. 1993).

The district court's finding that the substitution of counsel would create delay without good cause was not an abuse of discretion. Even though Luem's new counsel waived any request for a continuance, Luem himself was in Georgia conducting surgery on the first day of trial. Billetter's counsel intended to call Luem as his first witness for the scheduled start of trial that day. He did not subpoena Luem because he expected him to be present to act as his own attorney. *See* C.D. Cal. Civ. R. 2.9.2 ("Any person representing himself or herself without an attorney must appear personally for such purpose."); *id.* 2.8.2.1 ("An application for leave to withdraw [as counsel] must be made upon written notice given reasonably in advance to the client and to all other parties who have appeared in the action.").

Trial would have been delayed, therefore, if the district court allowed substitution of counsel. Considering the long standing trial date and Luem's failure to keep up with communications with the court, the district court did not abuse its discretion by failing to find good cause.

Nor does the district court's refusal to substitute counsel violate any rights held by Luem. "[I]t is well-established that there is generally no constitutional right to counsel in civil cases." *United States v. Sardone*, 94 F.3d 1233, 1236 (9th Cir. 1996); *see also Hernandez v. Whiting*, 881 F.2d 768, 770-71 (9th Cir. 1989) ("A prisoner ... cannot demand to be present at any stage in the development of his civil case and has no claim, barring special circumstances, to have counsel assigned to be present for him."). Luem does not possess any constitutional rights that would permit him to substitute attorneys at will.

The district court is AFFIRMED.

DATED: April 3, 1996.

/s/ ALICEMARIE H. STOTLER
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL FOR PARTIES AT THEIR RESPECTIVE MOST RECENT, ADDRESS OF RECORD, IN THIS ACTION ON THIS DATE: 4/5/96

/s/
DEPUTY CLERK